OCT 17 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 369

O. G. CARROLL AND ANGELA J. CARROLL, HUSBAND AND WIFE,

Petitioners,

vs.

LAURETTA KELLY, AS ADMINISTRATRIX OF THE ESTATE OF MORRIS C. KELLY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

CLARENCE C. DILL,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	4
Statement	5
Reasons for granting the writ	10
Conclusion	11
Appendix A—Rule 22 of the Supreme Court of Washington	12

Cases Cited

Brooks v. *Herd*, 144 Wash. 173, 257 Pac. 238	4, 6, 10
Fritz v. *Horsfall*, 24 Wash. (2d) 14, 163 P. (2d) 148	4, 7, 10

Statute Cited

28 U. S. C. 1257(3)	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 369

O. G. CARROLL AND ANGELA J. CARROLL, HUSBAND AND WIFE,

Petitioners,

vs.

LAURETTA KELLY, AS ADMINISTRATRIX OF THE ESTATE OF MORRIS C. KELLY, DECEASED,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

The petitioners, O. G. Carroll and Angela J. Carroll, husband and wife, pray that a writ of certiorari issue to review the judgment, opinion and decision of the Supreme Court of the State of Washington, and the order denying petitioners' Petition for a Rehearing in cause No. 31182 entitled O. G. Carroll and Angela J. Carroll, husband and wife, appellants, *vs.* Lauretta Kelly, as administratrix of the estate of Morris C. Kelly, deceased, respondent. The judgment, opinion and decision was rendered and filed May 31, 1950, and the Order denying said Petition for Rehearing was made and filed July 19, 1950.

Opinions Below

The judgment, opinion and decision of the Supreme Court of the State of Washington (R. 14-31) is reported in 136 Wash. Dec. 445 and 219 P. (2d) 79, and the decision and order denying petitioners' Petition for Rehearing (R. 79) reported in 136 Wash. Dec. 791.

Jurisdiction

The judgment and decision of the Supreme Court of the State of Washington was made and filed on May 31, 1950, and within the time prescribed by Rule 22 of the Rules of the Supreme Court of Washington, Appendix "A" (*infra* p. 12) the petitioners filed in the Supreme Court of the State of Washington their Petition for Rehearing (R. 32).

It is the contention of the petitioners that this court has jurisdiction under the provisions of 28 U. S. C. 1257(3) in that:

I. The opinion of the Supreme Court of the State of Washington will deprive the petitioners of their right of property and right to liberty in the pursuit of their profession without due process of law, contrary to the provisions of Amendment XIV of the Constitution of the United States.

II. The opinion of the Supreme Court of the State of Washington abridges the privileges of the petitioners and is discriminatory, contrary to the provisions of Amendment XIV of the Constitution of the United States.

III. The opinion of the Supreme Court of the State of Washington denies the equal protection of the law within the jurisdiction of the State of Washington to the petitioners, contrary to the provisions of Amendment XIV of the Constitution of the United States.

The Supreme Court of the State of Washington is the court of last resort and its decision is final. It consists of

nine (9) Justices who comprise two (2) departments, designated as Departments I and II, which departments alternate hearing appellate causes, one of the nine (9) Justices acting as Chief Justice of both departments; that is, each department is constituted of the Chief Justice and four (4) Associate Justices. Unless, therefore, a hearing en banc is granted the decision of the majority of the Justices of each department is the final decision of the court. The decision and opinion of the court (R. 14 was made and entered by Department II, the opinion having been written by Justice Mallery and concurred in by Chief Justice Simpson and Justices Robinson, Hill, and Hamley. Appellants' Petition for Rehearing was denied and no en banc hearing was granted. Under Rule 22 of the Rules of the Supreme Court of the State of Washington (Appendix A, *infra* p. 12), a Petition for Rehearing shall be filed within thirty (30) days after the opinion is rendered, and the filing of such Petition shall suspend the decision of the court until the cause is finally determined. A Petition for Rehearing was filed with the Clerk of the Supreme Court of the State of Washington on June 28, 1950, within thirty (30) days after the filing of the judgment, decision and opinion, and under Rule 22 the decision of the court was suspended until July 19, 1950, when the Order Denying the Petition for Rehearing was entered.

The federal question on which petitioners rely had its inception and was created by the wholly unanticipated and unexpected decision of the Supreme Court of the State of Washington, written by the Honorable Justice Mallery and filed as of May 31, 1950 (R. 14), which opinion overruled the long established rules and principles governing the practice and procedure applicable to the trial in malpractice cases, under which rules and principles the case had been tried in the lower court, as hereinafter set out under the headings, "Questions Presented," and "Reasons for Grant-

ing the Writ." The federal question, therefore, arose for the first time in the Washington Supreme Court upon the decision of the court and the Petition for Rehearing, no prior opportunity having been presented to raise such federal question.

The long established principles of law governing the relation of regular physicians and surgeons and their patients also govern the relationship of drugless physicians and sanipractors and their patients. These general principles are set out in the Washington cases of *Brooks* v. *Herd,* 144 Wash. 173, 257 Pac. 238, and *Fritz* v. *Horsfall,* 24 Wash. (2d) 14, 163 P. (2d) 148, for many years a leading case, and indicate that the rules of law governing actions for malpractice as to regular physicians apply to drugless healers and sanipractors. These cases are discussed under the heading, "Reasons for Granting the Writ."

Questions Presented

I. Has a defendant been deprived of his constitutional guarantee of a fair and impartial trial in a case where the state court of last resort disregards the established rules of evidence of prior decisions of that state, and refuses to consider in its opinion evidence of experts presented under the rules of evidence as they existed prior to the decision of the court, without permitting the defendant the benefit of a new trial in accordance with the radically changed rules of evidence?

II. Has a defendant been deprived of his property rights and his right of liberty in the pursuit of his profession under Amendment XIV of the Constitution of the United States in a malpractice case against a drugless physician in which the state court of last resort discriminated against and denied the equal protection of the law by a decision and opinion overruling the established general rules of such state governing the relation of drugless physicians and their patients, under which established rules the case was tried, and establish-

ing radically different rules and principles discriminating against drugless physicians and different from those applied to medical practitioners without affording the defendant the opportunity to defend under the rules and principles established by the decision?

III. Has a defendant been deprived of the equal protection of the law of a state where in a malpractice action such defendant is denied the established protection of the law of that state by reason of the fact that he is a drugless physician and is discriminated against by a radical change in the rules of evidence, holding that such rules of evidence are not applicable to a drugless physician although they are applicable to other physicians and surgeons, notwithstanding the fact that both are licensed to practice under the statutes of the state and the defendant had complied with all statutory requirements?

IV. In a malpractice action against a drugless physician has a state, by an opinion of the court of last resort of that state, abridged a defendant's privileges and immunities and right of liberty in the practice of his profession by discriminating against such defendant in an opinion which holds that such defendant may not use the title "Doctor," although he has complied with all of the statutory requirements of such state in the practice of his profession?

Statement

As shown by the amended complaint (R. 1) this is an action to recover damages for the alleged wrongful death of one Morris C. Kelly, brought by the administratrix of his estate, against the petitioner O. G. Carroll, a drugless physician, and his wife. The answer (R. 6) denied the allegations of negligence and pleaded contributory negligence as an affirmative defense. The case was tried to the court sitting with a jury, and resulted in a verdict in favor of the plaintiff (respondent herein) against the defendants (peti-

tioners herein) in the amount of $15,837.35. Motions for judgment *non obstante veredicto* or in the alternative for a new trial were made by the defendants and denied by the court and judgment was entered on the verdict, from which an appeal was taken to the Supreme Court of the State of Washington. On the appeal the court rendered its opinion and decision (R. 14) reported in 219 P. (2d) 79, and within the time prescribed by the rules of the supreme court (Rule 22, Rules of Supreme Court of Washington (Appendix "A", p. 12 *infra*), petitioners presented to the Supreme Court of Washington their Petition for Rehearing (R. 32). The petition presented to the court for the first time petitioner's claim that by reason of the fact its opinion and decision overruled the long established general rules and principles laid down by the court, and followed by the parties on the trial of the action, and established different and entirely revolutionary rules as applied to malpractice cases involving drugless physicians, that the constitutional rights of petitioners, under Amendment XIV of the Constitution of the United States had been violated and that they had been or would be deprived of their property and their right of liberty in the pursuit of their profession without due process of law, and have been discriminated against and denied equal protection of the law. The Petition for Rehearing was denied (R. 29).

Under date of June 22, 1927, the Supreme Court of the State of Washington by its decision in the case of *Brooks* v. *Herd*, 144 Wash. 173, 257 Pac. 238, laid down the principles of law governing the relations of drugless physicians and their patients in the following language:

> "Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of healing. *Otherwise, the principles of law governing the*

relations of regular physicians and surgeons and their patients govern as to drugless healers and their patients.

Until the decision in the case brought by the respondent against petitioners on May 31, 1950 (R. 14), the Supreme Court of the State of Washington had not overruled or modified the holding in the case of *Brooks* v. *Herd, supra.*

November 1, 1945, the Supreme Court of the State of Washington, by its decision in the case of *Fritz* v. *Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, which was an action for malpractice, held: (omitting supporting citations)

> "Before referring to the facts, however, it seems advisable to set out certain general rules of law governing actions for malpractice which are almost universally accepted by the courts and which are applicable to the present situation. We set them out as follows:
>
> (1) An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average member of the profession in the community in which he practices, and that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment.
>
> (2) The contract which the law implies from the employment of a physician or surgeon is that the doctor will treat his patient with that diligence and skill just mentioned. (citing a case)
>
> (3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in his profession. (citing cases)
>
> (4) Before a physician or surgeon can be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by those standards. (citing cases)

(5) In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard.

(6) It is not required that physicians or surgeons guarantee results, nor that the result is what is desired. (citing cases)

(7) The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. *In such cases, the court must hold that there is nothing on which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other.* (citing cases)

(8) Negligence on the part of the physician or surgeon by reason of his departure from the popular standard of practice must be established by medical testimony. (citing cases)

The reason is that juries must be informed as to the facts or criterion upon and by which the standard of ordinary skill and ordinary care and diligence rests and is regulated by the medical profession. To supply the need, evidence may properly be introduced to show such facts. This evidence, from the very nature of the case, must come from men learned in the profession because other witnesses are not competent to give it. *Jurors* and *courts* are not in any way conversant with what is entirely peculiar to the practice of medicine and surgery. They may not arbitrarily determine the proper methods of treating an ailment, that is a medical question."

On the trial of the action the plaintiff (respondent here) offered the testimony of Dr. Oscar O. Christenson, a pathologist, who performed an autopsy on the deceased, Morris C. Kelly, and made a report and testified as to his findings.

The plaintiff also offered testimony of Drs. H. J. Copsey and Dr. Carl F. Schlicht, both medical physicians, and Dr. Schlicht, a surgeon who performed a minor operation on the deceased on July 21, 1948, and who treated the deceased from that time to July 28, 1948, when he died. Neither of these two doctors was permitted to testify as to anything with reference to their findings of the physical condition of the deceased and their treatment of him, nor were they permitted to pass judgment on whether or not the diagnosis and treatment by the petitioner Dr. O. G. Carroll was proper or improper.

The defendant produced as witnesses Dr. H. Riley Spitler, who qualified as an expert in the practice of drugless healing and naturopathy, a branch of drugless healing, Dr. John B. Bastyr, who qualified as an expert in the practice of drugless healing, naturopathy and as a pathologist, and Dr. W. A. Budden, who qualified as an expert in the practice of drugless healing, naturopathy and pathology, all of whom gave as their expert opinion that the diagnosis and treatment of the deceased Morris C. Kelly by the petitioner Dr. O. G. Carroll was proper and was not negligent and did not cause the death of the said Morris C. Kelly.

As opposed to the testimony of the defendants' witnesses above referred to the plaintiff offered the testimony of Dr. Carl G. Stevens, who qualified as a sanipractic physician, which is considered in the category of a drugless physician, who testified that if he diagnosed Morris C. Kelly's ailment as appendicitis, he would not attempt to treat him but would refer him to a surgeon for surgery, but did not state that Morris C. Kelly was afflicted with appendicitis. The trial court submitted the case to the jury under the rules of law laid down by the case of *Fritz* v. *Horsfall, supra,* which was the law of the state up to and until the time of the rendering and entering of the opinion and decision in the case of respondent *vs.* petitioners herein.

It is the position of the petitioners that by the opinion and decision (R. 14) the Supreme Court of Washington has overruled and abrogated rules of law established and followed in the trial of this case, and without giving the petitioners an opportunity to present their defense under the rules established by the opinion and decision, the petitioners have been or will be deprived of their constitutional rights above referred to.

Reasons for Granting the Writ

The petitioners contend that by reason of the opinion and decision of the Supreme Court of the State of Washington entered May 31, 1950 (R. 14), they have been discriminated against and have been denied equal protection of the law and have been or will be deprived of their property and their right of liberty to pursue their profession contrary to the provisions of Amendment XIV of the Constitution of the United States.

On the issues raised by the pleadings the case was tried in the trial court strictly in accordance with the rules governing malpractice cases as formulated in the cases of *Brooks* v. *Herd*, 144 Wash. 173, 257 Pac. 238, and *Fritz* v. *Horsfall*, 24 Wn (2d) 14, 163 P. (2d) 148, particularly in that petitioners limited their expert testimony to practitioners of their own system of drugless healing.

By its opinion and decision the Supreme Court of the State of Washington judicially legislated that drugless physicians practicing and using the same methods used by petitioner Dr. O. G. Carroll could not qualify as expert witnesses and were not entitled to give an expert opinion as to whether or not Dr. Carroll's treatment was proper or improper, and further, without support in the record that the deceased Morris C. Kelly, during the time he was under the care and treatment of Dr. Carroll was afflicted with appendicitis, that there is no other recognized method of

treating a condition known as appendicitis than by a surgical operation.

For all of these reasons the petitioners pray that if the rules and principles governing the relation of physician and surgeon are different from the relation of drugless healers and their patients, that they be given an opportunity to defend the claims of the respondent on the basis of the rules promulgated in the opinion and decision rendered by the Supreme Court of Washington, May 31, 1950 (R. 14).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE C. DILL,
Counsel for Petitioner.

(Date:) Oct. 7, 1950.

APPENDIX "A"

Rule 22 of the Rules of the Supreme Court of the State of Washington, in effect March 2nd, 1944, and still in effect, reads as follows:

"RULE 22—REHEARINGS

(1) Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

(2) Twenty-five printed copies of the petition shall be filed with the clerk.

(3) When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

(4) When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days.

(5) Petitions for rehearings shall be printed and of the dimensions and style required by Rule 16 in the case of briefs."